No. 80-1296

In the Supreme Court of the United States

OCTOBER TERM, 1980

SOUTHERN CALIFORNIA FINANCIAL CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the acquisition by the Air Force of successive term easements in property owned by petitioner constitutes a taking of the fee simple interest in petitioner's land for which additional compensation is due.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 2

Conclusion 7

TABLE OF AUTHORITIES

Cases:

Berman v. *Parker*, 348 U.S. 26 ..... 2, 3

Kimball Laundry Co. v. *United States*, 338 U.S. 1 2

United States v. *Causby*, 328 U.S. 256 6

United States v. *General Motors Corp.*, 323 U.S. 373 2

United States ex rel. T.V.A. v. *Welch*, 327 U.S. 546 ..... 2, 3-5

Statutes:

Declaration of Taking Act, ch. 207, 46 Stat. 1421, 40 U.S.C. 258(a) 4

Tucker Act, 28 U.S.C. 1491 2

10 U.S.C. 2233a 3

10 U.S.C. 2663 4

10 U.S.C. 2663(a) 4

10 U.S.C. 2672 3

10 U.S.C. 9773 4

Pub. L. No. 92-204, 85 Stat. 716 3

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OPINIONS BELOW

The opinion of the Trial Division of the Court of Claims (Pet. App. 1-39) is not reported. The opinion of the Court of Claims (Pet. App. 40-49) is reported at 634 F. 2d 521.

JURISDICTION

The judgment of the Court of Claims was entered on September 10, 1980. A petition for rehearing *en banc* was denied on October 31, 1980 (Pet. App. 50). The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATEMENT

In 1969, petitioner Southern California Financial Corporation purchased a 119.5-acre tract that is adjacent to an ammunition storage dump located on March Air Force Base, Riverside County, California. From 1949 until 1962, the Air Force acquired by contract term negative easements in the subject property, which serves as a safety and buffer strip. From 1962 to the present, the Air Force has condemned one-year easements in five-year blocks. The estate condemned by the United States is a nonexclusive term extendible for yearly periods at the election of the United States; the right to cultivate the land is reserved to petitioner. Residential development and similar uses are forbidden under the terms of the leases; structures for human habitation may not be built or maintained; and gatherings of more than 25 persons are forbidden (Pet. App. 40-42).

When the then-current lease was about to expire in 1972, petitioner asked the United States to purchase the fee. The United States filed a declaration of taking in 1972 to condemn a negative easement lease (Pet. App. 57). At that time, petitioner raised the defense that the successive series of leases amounted to a condemnation of the fee (*id.* at 64). Upon a motion by the United States, the United States District Court for the Central District of California struck the answer (*id.* at 18, 66).

In 1974, petitioner brought suit in the Court of Claims under the Tucker Act, 28 U.S.C. 1491, alleging that the successive term easements constituted a taking of the fee simple for which additional compensation was due. A trial was held in 1978, after which the trial judge found for petitioner and ordered that a second trial be held to decide the issue of just compensation (Pet. App. 39). The Court of Claims reversed, holding that no compensable taking of a fee or perpetual easement had occurred because the Air Force lacked the authority to do so (*id.* at 49). A petition for rehearing en banc was denied.

ARGUMENT

The decision of the Court of Claims is correct and conflicts with no decision of this Court or of any court of appeals. The petition presents no issue warranting further review.

Petitioner contends that the acquisition by the Air Force of successive term easements in property owned by petitioner constitutes a taking of a fee simple interest for which additional compensation is due. Petitioner erroneously states that the United States has taken "a greater interest in land than that specified in the declaration of taking" (Pet. 7). In fact, the only property interest that the United States has sought or obtained is a term easement. The Court of Claims agreed, holding that no compensable taking of a fee or perpetual easement had occurred (Pet. App. 43).

The United States has the power to acquire, by purchase or condemnation, any interest in land deemed appropriate. *Kimball Laundry Co.* v. *United States*, 338 U.S. 1 (1949); *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945). The amount and the character of the land to be taken rests within the discretion of the legislative branch and the acquiring agency. *Berman* v. *Parker*, 348 U.S. 26, 35 (1954); *United States ex rel. T.V.A.* v. *Welch*, 327 U.S. 546,

551-552 (1946). Petitioner apparently challenges the authority of the Air Force, an agency of the United States, to determine the kind of interest in property that it will take, by castigating the Air Force for failing to "utilize an available appropriation procedure" (Pet. 17). That challenge is without merit. The "appropriation procedure" to which petitioner refers is the seeking of funds under the annual Department of Defense appropriation bill.[1] Where the Air Force seeks to acquire any interest in land with a value exceeding $50,000, it is required to seek congressional authorization (Pet. App. 44). See 10 U.S.C. 2233a, 2672. As the Court of Claims properly noted (Pet. App. 47), "[t]he Air Force was not empowered by itself to take a fee or indefinite easement on plaintiff's land, nor was it authorized to take successive one-year easements intending those easements to be permanent or without limit in time. In the face of the express requirement to seek Congressional consent in a Military Construction Authorization statute, there can be no implied authority to take a permanent or indefinite interest apart from that route." Consequently, while the Air Force is authorized to condemn a leasehold interest in the subject property, it currently lacks statutory authority to condemn a greater interest without express congressional authority and, as the Court of Claims recognized (*ibid.*), a holding that the entire fee was taken would undermine Congress' authority to control the extent of property interests acquired by federal agencies.

A court's function in reviewing condemnation cases is concluded when the court establishes the requisite statutory authority and propriety of the public purpose. *Berman* v. *Parker*, 348 U.S. 26 (1954). If a court were to exceed that

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[1]See, *e.g.*, Pub. L. No. 92-204, 85 Stat. 716 (appropriating funds for the Department of Defense for the fiscal year ending June 30, 1972).

narrowly defined role, the United States, through its agencies, would be denied the authority to acquire by eminent domain the particular type of interest in land it deemed necessary. The trial judge erroneously concluded that the Air Force had the intention "to continue to condemn such leases for the same purpose, into the indefinite future * * *," and that petitioner had thus been deprived of all use of his property (Pet. App. 7). While the trial judge, in his findings, concluded that "[t]he United States * * * has a permanent need for the subject property" (*id.* at 18), the complaint in condemnation specifically stated that "[t]he estate taken for said public uses is a non-exclusive term for years beginning July 1, 1972, and ending March 31, 1973, extendible for yearly periods thereafter, at the election of the United States, until March 31, 1977 * * *" (Pet. App. 52). Thus, it is erroneous for petitioner to conclude that "since the Government has a permanent need for the subject property as a safety and buffer zone for the ammunition storage area (App. A, Findings 14-18), petitioner will never be restored to unrestricted possession of the property and will never be able to develop it" (Pet. 4-5).

The authority of the United States to take less than a fee simple interest in property is clearly defined. The Declaration of Taking Act, ~~ch. 297~~, 46 Stat. 1421, 40 U.S.C. 258(a), provides in part:

> Upon the filing of said declaration of taking and of the deposit in the Court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America * * *.

The specific authority for the temporary taking of petitioner's property is found in 10 U.S.C. 2663 and 10 U.S.C. 9773. 10 U.S.C. 2663(a) provides:

> The Secretary of a military department may have proceedings brought in the name of the United States * * * to acquire by condemnation any interest in land, including temporary use * * *.

In rejecting the defense of the Air Force that it lacked the authority to purchase the fee interest in petitioner's property (Pet. App. 9), the trial judge found that the "Government's motive is simply economy" (Pet. App. 4). That motive, however, is hardly impermissible: "[T]he Government, just as anyone else, is not required to proceed oblivious to elements of cost." *United States ex rel. T.V.A.* v. *Welch*, 327 U.S. 546, 554 (1946).

The taking of a series of term easements in a piece of property cannot be construed as an attempt, deliberate or otherwise, to take property rights without just compensation. Petitioner attempts to analogize the successive term easements condemned here by the United States to actions taken by the United States that resulted in an unforeseen taking of property. In so doing, petitioner attempts to rewrite the law of inverse condemnation to provide that mere successive leaseholds in a condemnee's property can constitute a taking of the fee, without regard to whether the government's action actually impairs the condemnee's ability to use the property. Petitioner cites *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U.S. 327 (1922), a case that is clearly distinguishable. In *Portsmouth*, this Court held that the cumulative effect of certain direct physical invasions of the landowner's property amounted to a taking. In the present case, the maintenance of an ammunition dump by the Air Force on government property cannot be considered a tortious invasion or trespass of petitioner's property. Further, while the United States Army inflicted the trespass on a nearby existing hotel in *Portsmouth*, petitioner purchased the property over fifteen years after the Air Force had begun to use its property as an ammunition dump site. The Court of Claims noted "(a) that, unlike

Portsmouth and [*United States* v.] *Causby*, [328 U.S. 256 (1946)], there was no existing physical intrusion onto plaintiff's land through Air Force activities on adjacent March Air Force Base, and (b) that it is unlikely that the mere danger from the adjacent ammunition dump, not involving any existing invasion of plaintiff's land, would constitute, in itself, a Fifth Amendment taking" (Pet. App. 47 n.6).

By their very nature, successive term acquisitions are uncertain of duration. At military bases, the future need for land is particularly subject to numerous contingencies, and the United States must necessarily have the flexibility to acquire an interest in land less than the fee.

In seeking to have this Court consider whether the successive term easements constitute a taking of the fee, petitioner is, in reality, questioning the compensation that it has been receiving since 1969. The trial judge made a finding that the highest and best use of the property is "to hold it for speculation for future residential development" (Pet. App. 38, Finding No. 70). The obvious question, in view of this finding is: in what way does the term easement, with its annual rental payments from the United States, prevent or diminish the petitioner's ability to hold the property for some future use? Petitioner is receiving just compensation for an easement over property whose very limited uses are acknowledged.

Finally, petitioner suggests that a reversal by this Court of a case presently pending, No. 79-678, *San Diego Gas & Electric Co.* v. *City of San Diego*, would mandate a reversal of the holding of the Court of Claims here. There is no merit to that assertion in light of the totally different legal theories involved in the two cases. *San Diego Gas & Electric Co.* deals with rezoning by the City of San Diego of land held by a utility, which, in the utility's view, amounted to a taking without just compensation. The California Court of

Appeals held that there was no compensable taking under the California constitution. This Court's holding in that case will be plainly irrelevant to the present case inasmuch as petitioner was awarded full just compensation for the condemned easement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1981